A **SEAWEALTH NAUTICAL SDN BHD**

v.

KEKAL KAYA MARIN SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-24NCC-21-2010]
26 MAY 2010

C ***CIVIL PROCEDURE:*** *Injunction - Injunction to restrain presentation of winding-up petition - Debt substantially disputed - Whether Fortuna injunction to be granted - Governing principles - Whether presentation of petition would cause irreparable damage to company - Whether suitable alternative procedure available*

D ***COMPANY LAW:*** *Winding up - Petition - Injunction to restrain petition - Debt substantially disputed - Whether Fortuna injunction to be granted - Governing principles - Whether presentation of petition would cause irreparable damage to company - Whether suitable alternative procedure available*

E

This was the plaintiff's application for an injunction to restrain the winding-up petition presented by the defendant. The main issue was whether the defendant could resort to a suitable alternative procedure instead of presenting the petition in light of the F defendant's claim that was disputed by the plaintiff.

Held (allowing plaintiff's application):

(1) This was a proper case to exercise the court's jurisdiction to grant a Fortuna injunction on principles accepted by the Court G of Appeal in *Mobikom v. Imiss Communication*. The facts of the case fell within the second principle governing the grant thereof, *ie*, that there was clearly a disputed claim and that the defendant was using a procedure which would invariably produce irreparable damage to the company rather than a H suitable alternative procedure - the suitable alternative procedure being that the defendant should commence a proper suit and obtain a proper judgment before proceeding with the winding-up proceeding. (paras 1-3)

I **(2)** The defendant in the present case was a sub-contractor doing wiring works on a shipping vessel whilst the plaintiff was the main contractor. All that the defendant was able to show was its invoices to purportedly establish a sum owed by the

plaintiff on a bare allegation that works were done as per the contract between them. The plaintiff had produced a job progress and a completion status document verified by a marine surveyor which proved that there was no satisfactory completion of the works done which were still subject to testing and commissioning. A s. 218 notice under the Companies Act 1965 could not be served in such circumstances. (para 10)

Case(s) referred to:

Fortuna Holdings Pty Ltd v. The Deputy Commissioner Of Taxation [1978] VR 83 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd [2000] 6 CLJ 290 HC ***(refd)***

Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***

Safeguards Corporation Sdn Bhd v. Rampai Town Centre Sdn Bhd [2008] 5 CLJ 629 HC ***(refd)***

Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***

For the plaintiff - Wan Mohamad Amin (Norliyana Rosalam with him); M/s Wan M Amin & Assocs

For the defendant - S Ashok; M/s TK Wong Tan & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Mohamad Ariff Yusof J:

[1] This is a proper case for the court to exercise its jurisdiction to grant a "Fortuna" injunction, on principles which have been accepted by the Court of Appeal in *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (approving and adopting the principles in *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83).

[2] A presentation of a Winding-Up Petition may be restrained by injunction where its presentation would amount to an abuse of the court's process. The facts of this case falls within the second principle in "Fortuna" ie, here there is clearly a disputed claim where the defendant is using a procedure which will invariably produce irreparable damage to the company rather than by a suitable alternative procedure.

[3] The defendant should commence a proper suit and obtain a proper judgment before proceeding with winding-up proceeding. That, in the circumstances of this case, would be the suitable alternative procedure.

[4] I am mindful of the statement made in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 where Abdul Hamid Mohamad, JCA (as His Lordship then was) said:

> It is timely that the court come out strongly against the unhealthy trend in the way Winding-Up Petitions are often conducted. Instead of defending the petition proper at the hearing of the petition, the Respondent makes all kinds of interlocutory application that would invariably stall the hearing of the petition proper. Such practice is unfair to the petitioners and clogging the court docket. (Headnote 3 summary the views presented on pp. 203 - 205 of the report).

[5] This is mere observation (dictum), rather that being part of the *ratio decidendi* in that case. While there could be instances where undeserving interlocutory applications are made to delay or stall the hearing of a Winding-Up Petition, much will depend on the precise circumstances of the case. It cannot be construed as excluding the court's jurisdiction to order a "fortuna injunction" in a proper case.

[6] Where the presentation of a Winding-Up Petition will be clearly abusive of court process and is used for an obviously collateral purpose, the court must be mindful of the dire commercial consequences to the company petitioned against or intended to be petitioned against.

[7] The availability of a Fortuna Injunction has been reaffirmed in such cases as *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305 (Court of Appeal) and *Safeguards Corporation Sdn Bhd v. Rampai Town Centre Sdn Bhd* [2008] 5 CLJ 629 (High Court). In the latter decision, Kang Hwee Gee J stressed on the aspect of the petition, if presented, would have no chance of success since the debt is disputed on substantial grounds, which is the test to apply in cases such as this, and not merely the normal test of "serious question to be tried", ie, the *American Cynamid* test.

[8] It is pertinent to note and reinstate the practical effect of allowing a petition to be presented when a debt is *bona fide* disputed on substantial grounds, as explained by Mohd Ghazali J (as he then was) in *Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd* [2000] 6 CLJ 290:

> A Winding-Up Petition is not a legitimate means of seeking to enforce payment of a debt which has not been clearly determined; otherwise the courts, when faced with a Winding-Up Petition on a debt which is not based on a judgment debt, would first have to establish the debt due, viz, whether the alleged debt claimed is the actual amount owing based on the evidence available. The courts which hear Winding-Up Petitions will then be put to unnecessary strain if a petition to wind-up is based not upon a judgment debt but purely on a s. 218(2)(a) notice ..." (at p. 298). The learned judge in fact also quoted Rigby J in *In re Ban Hong Co. Ltd.* [1959] MLJ 100 where it was said "a Winding-Up Petition is not to be used as machinery to try a common law action."

[9] Granted a judgment debt is not a prerequisite, to proceed on a non-judgment debt requires more than a more mechanical adherence to the statutory provision of s. 218(2)(a). If the debt is *bona fide* disputed on substantial grounds, and if, in certain cases a petition if presented will be bound to fail, the courts can, and should, restrain the creditor from presenting a Winding-Up Petition, and if presented, to restrain further proceedings on it, to prevent abuse of the court's process.

[10] On the evidence before me in this application, it is demonstrably clear the debt is vigorously disputed. The defendant is a sub-contractor doing wiring works on a shipping vessel. The plaintiff is the main contractor. All that the defendant has been able to show is its invoices to purportedly establish a sum due on a bare allegation that works have been done as per contract. The plaintiff has now produced a "job progress and completion status" document verified by a "Marine Surveyor" for the employer, which proves there is as yet no satisfactory completion of the works, which are still subject to testing and commissioning. How could a s. 218 Notice be served in such circumstances?

[11] For these reasons, I allow the plaintiff's application as prayer in encl. 1 (originating summons) prayer 1, with costs RM5,000 to be paid by the defendant to the plaintiff within one month from the date of this order.